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In the Supreme Court of the United States

October Term, 1959

Manhattan Eye, Ear & Throat Hospital, Inc., and James A. Merchant, Jr., Petitioners,

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 571

MICHAELS ENTERPRISES, INC., and
JAMES A. MICHAELS, JR., *Petitioners*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8; C.A. 1-12) is at 321 F. 2d 913.[1]

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[1] The record consists of three volumes as follows: (1) the original files of the district court designated as "R."; (2) the transcript of the trial designated as "Tr."; and (3) the record in the court of appeals designated as "C.A."

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1963 (Pet. App. 9; C.A. 9). A petition for rehearing was denied on September 20, 1963 (C.A. 10). The petition for a writ of certiorari was filed on October 19, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether specific intent, including proof of knowledge of the law, is an element of the offense described in 26 U.S.C. 5603(b), relating to breach of the record-keeping requirements of the federal liquor laws.

2. Whether the evidence showed that petitioners failed to "keep" some documents, and kept but failed to "produce" others, thereby violating both paragraphs one and five of 26 U.S.C. 5603(b).

STATUTES INVOLVED

26 U.S.C. 5124(a) provides:

> (a) Receipts.
>
> Every retail dealer in liquors and every retail dealer in beer shall provide and keep in his place of business a record in book form of all distilled spirits, wines, and beer received, showing the quantity thereof and from whom and the dates received, or shall keep all invoices of, and bills for, all distilled spirits, wines, and beer received.

26 U.S.C. 5146(a) provides:

> (a) Preservation and inspection of records.
>
> Any records or other documents required to be kept under this part or regulations issued pur-

suant thereto shall be preserved by the person required to keep such records or documents, as the Secretary or his delegate may by regulations prescribe, and shall be kept available for inspection by any internal revenue officer during business hours.

26 U.S.C. 5603(b) provides in pertinent part:

(b) Failure to comply.

Any person required by this chapter * * * to keep or file any record, return, report, summary, transcript, or other document, who, otherwise than with intent to defraud the United States, shall

(1) fail to keep any such document or to make required entries therein; or

* * * * * * * *

(5) fail [or] refuse to preserve or produce any such document, as required by this chapter or regulations issued pursuant thereto;

or who shall, otherwise than with intent to defraud the United States, cause or procure the same to be done, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, for each such offense.

STATEMENT

Petitioner Michaels Enterprises, Inc., is a corporate retail dealer in alcoholic beverages whose president is petitioner James A. Michaels, Jr. (Tr. 15-16, 18). The petitioners were convicted by a jury in the Eastern District of Missouri under the first count of an indictment charging them with failing to keep records of purchases of beer, wine, and liquor, in violation of 26 U.S.C. 5603(b)(1), and under a second count charging failure to preserve and produce such records, in viola-

tion of 26 U.S.C. 5603(b)(5) (R. 1-2, 23-24).[2] James Michaels was sentenced to imprisonment for one year and fined one thousand dollars on the first count, and fined an additional one thousand dollars on the second count; the corporation was fined one thousand dollars on each of the two counts (R. 37-38). The court of appeals unanimously affirmed (Pet. App. 1-8; C.A. 1-12).

The pertinent facts may be summarized as follows:

On Tuesday, August 29, 1961, two agents of the Alcohol and Tobacco Tax Unit entered petitioners' bar and asked to inspect the premises and to examine invoices of purchases of alcoholic beverages (Tr. 18-22). After being told that James Michaels was away on vacation, they were permitted to inspect the upstairs portion of the premises where five or ten invoices were found lying on the end of the bar (Tr. 20-22, 43). The person in charge told them that he did not know where the other invoices were kept, and that he did not have a key to the basement which was locked (Tr. 20-23). Later an attorney telephoned and asked the agents to postpone completion of their inspection until the next day, when James Michaels was to return from vacation (Tr. 24). The attorney also discussed obtaining the invoices for the agents (Tr. 49).

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[2] 26 U.S.C. 5603(b) incorporates by reference the provisions of 26 U.S.C. 5124(a) and 5146(a) which create in retailer dealers of alcoholic beverages a statutory duty to maintain either invoices or record books of purchases of beer, wine, and liquor. The books of record offered into evidence by petitioners at the trial did not contain the information required by Section 5124(a), and therefore the only issue before the jury was whether purchase invoices were kept or produced (Tr. 167-169, 180).

When the agents returned the next day, August 30, petitioner James Michaels was present and stated that he would have to "dig up" the invoices (Tr. 24-25). The agents went downstairs and inspected a portion of the basement, but found neither records nor invoices. They could not gain admittance to a locked room in the basement marked "office" (Tr. 25-28); petitioner Michaels stated that he did not have the key but might be able to find it (Tr. 28). After making several telephone calls and contesting the agents' right to inspect, petitioner announced that he was leaving the bar for the purpose of seeing his lawyer and obtaining a key (Tr. 28-30, 63). The agents waited until 11:30 p.m., seven hours later, but he did not return. During their wait, petitioners' counsel again telephoned, and the agents asked him to have petitioner Michaels return (Tr. 30).

The next afternoon, August 31, petitioner, in the presence of the agents, unlocked the door to the "office" (Tr. 33-35, 190). The room—which was neither dirty nor dusty—contained a small bar, desk, filing cabinet, and an extension telephone which rang during the inspection (Tr. 54, 80, 191). After escorting the agents inside, petitioner left the "office", climbed up on a pile of furniture in the portion of the basement inspected by the agents on the previous day, and returned with a box containing thirty-seven invoices (Tr. 35, 68). In answer to a request for the rest of the invoices, petitioner stated that he had no more and suggested that they had been destroyed by a flood in the basement (Tr. 36, 50, 61-62).

At the trial, petitioners offered evidence that the basement had been flooded first in March and again on June 23, 1961 (Tr. 144-145, 148-150, 194-197). The

government showed that petitioners should have had invoices for 483 purchases between August 31, 1959, and August 31, 1961, and furthermore that twelve purchases had been made since June 23, 1961, the date of the alleged flood, for which there were no invoices among the thirty-seven produced for the agents (Tr. 87-113, 20 212, 225-226). The case was submitted to the jury under instructions to acquit petitioners if it found that all the records had been lost in the flood (Tr. 252-253).

ARGUMENT

1. Contrary to petitioner's contention, the jury was not instructed that 26 U.S.C. 5603(b) did not require an element of intent. The jury was charged that petitioners were to be acquitted unless they "knowingly failed to keep" and "knowingly failed and refused to produce" their invoices of purchases of alcoholic beverages, and that petitioners were not guilty if all the records had been lost in a flood (Tr. 251-253). The statute was therefore not construed to be within the class of public welfare offenses which impose strict criminal liability regardless of intent. Compare *United States* v. *Dotterweich*, 320 U.S. 277; see generally, *Morissette* v. *United States*, 342 U.S. 246, 250-263. Since a specific intent to defraud is not, under the language of the statute, an element of the crime, the instructions on intent were sufficient.

Petitioners argue that these must be proof of knowledge of the law and that failure to charge thereon should have been deemed plain error under Rule 52. It is, however, well established that ignorance of the law is not normally a defense to crime. *E.g.*, *Ellis* v. *United States*, 206 U.S. 246. While this principle is

not applicable to certain statutes which punish a wilful violation of a statutory duty—such as wilfully evading the payment of taxes, see *e.g.*, *United States* v. *Murdock*, 290 U.S. 389, and *Edwards* v. *United States*, 321 F. 2d 324 (C.A. 5)—the exception is a limited one. The statute here involved, which applies without a specific intent to defraud, is not within that limited class. Nor is this a statute where knowledge of the law must be deemed an element as a matter of due process. See *Lambert* v. *California*, 355 U.S. 225. The instant statute is an integral part of the enforcement of taxes on the sale or distribution of alcohol. This business has been subject to taxation for many years. One who engages in the tavern business, particularly one who, like petitioner, has been in it for nine or ten years (Tr. 202), is properly held to the obligation to know of the statutory regulations which bear upon the conduct of that closely regulated business.

2. Although no objection was taken at the trial, petitioners claim that it was improper to convict them both for failing to keep records under 26 U.S.C. 5603 (b)(1), and for failing to preserve and produce these records under 26 U.S.C. 5603(b)(3). The convictions, however, were neither inconsistent nor duplicative, for the evidence was more than adequate for the jury to find that some invoices were not kept, and that others were kept but not produced. After a delay of three days, petitioner produced thirty-seven invoices (Tr. 35, 68). It could be inferred from petitioner James Michaels' evasive conduct that the failure to produce the records on the second day was intentional. Specifically, petitioner Michaels told the agents on the

second day that no more invoices could be produced until he obtained a key to the locked office; yet the invoices were finally discovered on the third day outside the office in an area of the basement previously inspected by the agents (Tr. 24-30). Apart from those thirty-seven invoices, there were other invoices which should have been in petitioners' possession but which were never produced (Tr. 87-113, 207-212, 225-226). The jury could properly infer that those invoices had not been kept.

In any event, there is no inconsistency between the two counts of failing to keep and failing to produce records. At most the crimes are duplicative in the sense that a person who fails to keep records is necessarily unable to produce them. Therefore, if we should be incorrect in our view that the evidence shows that some records were not kept, and others were kept but were not produced, the proper disposition would be to vacate sentence on the second count for failing to keep records, rather than to reverse the convictions on both counts. The cases cited by petitioners (*Milanovich* v. *United States*, 365 U.S. 551, and *Heflin* v. *United States*, 358 U.S. 415) involved convictions for robbery and receiving stolen property, offenses which are logically inconsistent with each other because a receiver is defined as a person other than the thief. See *Cartwright* v. *United States*, 146 F. 2d 133 (C.A. 5). Because it was for the jury to decide which of the two inconsistent positions was established by the facts, the conviction in *Milanovich* was reversed. A different result has been reached in the case of bank robbery offenses, such as those involved in *Prince* v. *United States*, 352 U.S. 322, where the crimes were merely

duplicative rather than inconsistent. In that situation, if two sentences are imposed, the lesser is vacated.[3]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1963.

[3] The distinction between inconsistent and included offenses finds support both in case law and in contemporary scholarship. *United States* v. *Lawrenson*, 298 F. 2d 880, 889 (C.A. 4), certiorari denied, 370 U.S. 947; See *Model Penal Code* (Tent. Draft No. 5), Sec. 1.08.

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